

## MEMORANDUM

DATE: April 27, 2007

TO: Mr. Harry Hill, Director  
Division of Medicaid and Medical Assistance

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: 10 DE Reg. 1596 [Final LTC Life Estate and Promissory Note Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA) final regulations regarding: 1) treatment of life estates; and 2) treatment of purchases of promissory notes, loans, and mortgages. The regulations were published as 10 DE Reg. in the April 1, 2007 issue of the Register of Regulations.

SCPD commented on the proposed version of these regulations in February, 2007. Two estate planning attorneys also submitted comments. The DMMA has now adopted final regulations with three amendments recommended by the Council. First, the Council recommended inclusion of "effective 4/1/06" in Section 20320.2.2.2. DMMA agreed and inserted the phrase. Second, the Council recommended substituting "provided" for "providing" in Section 20320.2.2. DMMA agreed and effected the substitution. Third, the Council recommended substituting "of" for "or" in Section 20330.3. DMMA agreed and effected the substitution.

SCPD certainly appreciates that effected amendments based on the aforementioned comments; however, the Council still has a structural and substantive concern with Section 20330.3 that was not amended. In pertinent part, the proposed regulation recited as follows:

*DMMA will use the outstanding principal balance in determining resources unless the individual submits within 30 days the following information.*

*~~a. evidence of a legal bar to the sale of the agreement~~*

*~~b. an estimate from a knowledgeable source (financial institution, bank, real estate broker) showing the current market value of the agreement is less than its~~*

~~outstanding principal balance. The estimate must show the name, title and address of the source.~~

Essentially, the regulation recites that DMMA will consider the “following information” and then deletes the subsections with the “information”. This is structurally unsound. The deleted subsection allowed a note holder to demonstrate that its true worth is less than its outstanding principal balance. The Council objected to deletion of this subsection since a note could lose value based on a promissor’s bankruptcy or destruction of mortgaged premises. One of the estate planning attorneys proffered the same objection. DMMA responded that “the comment is accurate” but the applicant would be provided the opportunity to rebut the note’s value under a different regulation (Section 20320.2.2.6). SCPD continues to believe that the amended regulation is inherently flawed. For perspective, Council is attaching the new regulation and Section 203320.2.2.6.

A. First, it makes no sense to say that DMMA will adopt a certain value unless the applicant submits information while deleting the “information” section in its entirety.

B. Second, the regulation cited by DMMA as authorizing rebuttal of a note’s value only applies to life estates, not notes!

Since the error in the regulation is still obvious and patent, SCPD encourages reconsideration of this regulatory change.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the final regulations.

cc: Ms. Sharon L. Summers, DMMA  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

P&I/10reg1596 dmma-life estate 4-07